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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JASON RASHAD PEZANT,<br>Defendant and Appellant. | G040195<br>(Super. Ct. No. FSB058222)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of San Bernardino County, Bryan Foster, Judge. Affirmed as modified.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Jason Rashad Pezant of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)),[1] possession of ammunition by a felon (§ 12316, subd. (b)(1)), and three counts of unlawful possession of assault weapons (§ 12280, subd. (b)). The jury further found defendant committed all the offenses for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(A).) Defendant admitted having suffered a prior conviction (but not a prior prison term). The court sentenced defendant to a total prison term of 10 years as follows: the upper term of three years for possession of a firearm by a felon, with four years for the gang enhancement; a consecutive eight-month term for one count of possession of an assault weapon with one year and four months for the gang enhancement; a one-year enhancement for a prior prison term; and concurrent sentences on the remaining counts.

On appeal, defendant contends (1) the prosecutor peremptorily challenged an African-American prospective juror based solely on group bias; (2) insufficient evidence supported the finding he knew or reasonably should have known three firearms were assault weapons; (3) the court should have bifurcated trial of the gang enhancements; (4) the court should have released juror identifying information to him; and (5) the prior prison term enhancement must be reversed because a prior prison term was not admitted or found true. We agree the prior prison term enhancement must be stricken. In all other respects, we affirm the judgment.

## FACTS

Around 11:45 p.m., on September 20, 2006, police searched defendant's bedroom in a home located on a block claimed by the Gilbert Street Bloods gang. In a computer box behind a television, the police discovered "a nine-millimeter pistol loaded

[1] All statutory references are to the Penal Code unless otherwise stated.

with a magazine and several rounds of ammunition." On top of the television was "a key to a Ford vehicle."

Four Mustangs were parked by the home — three in the driveway and one in the backyard. On the night of the search, defendant's sister told police defendant owned all four Mustangs. A search of defendant uncovered a Ford key in his pocket that fit the ignition and front door of one of the Mustangs parked in the driveway. In that Mustang was "a bag of .44 caliber rounds."

The lone Mustang in the backyard was a dirty, primer-gray convertible that appeared to be inoperable and "had a tarp over the top" and an interior "full of leaves." The key located in defendant's bedroom opened this Mustang's trunk; it "did not work for any of" the Mustangs in the driveway. The lock on the trunk of the Mustang in the backyard appeared to be "brand new . . . unlike the rest of the car." Inside the trunk was a "large stash of weapons," including a Bushmaster AR-15 assault weapon with a loaded, detachable box magazine, a flash suppressor and a pistol grip conspicuously protruding from the bottom; a Norinco AK-47 with a pistol grip, a flash suppressor and a box magazine; and an Italian-made AR-15 modified to accept .22 caliber rounds and a threaded barrel which could accommodate a silencer. Some bags in the passenger compartment contained around 474 rounds of eight or nine types of ammunition.

A gang expert opined defendant is a member of the Little Zion Manor Bloods criminal street gang, a gang with about 20 members whose primary activities are narcotic sales, armed robberies and home invasion robberies. Little Zion Manor Bloods is a "blood set" or associated gang of the Gilbert Street Bloods. In February 2003, a Little Zion Manor Bloods' member committed murder. Another Little Zion Manor Bloods member was convicted of selling cocaine in July 2005. Defendant's moniker is T90. Roman Arroyo is defendant's cousin and a member of Gilbert Street Bloods. In June 2005, the gang expert contacted Arroyo driving the convertible primer-gray Mustang; the expert reported Arroyo owned the car at the time. A gang member's

maintenance of "a cache of weapons, including several assault-type weapons and several hundred rounds of ammunition" would benefit a gang because "weapons are commonly used to commit other crimes such as murders, robberies, armed robberies, home invasion robberies," "to fend off other rival gangs," and for personal protection. Such a cache would be "like the armory for the gang." The member's status in the gang would be elevated by taking on such a significant risk for the gang.

Defendant's sister testified Arroyo owned the fourth Mustang and she had seen him drive it months before September 2006. When she told an officer on the date of the search that the car in the back of the house belonged to defendant, she was referring to a red Trailblazer parked on the side of the house. Defendant's mother also testified the fourth Mustang belonged to Arroyo. An officer testified defendant's mother stated on the date of the search that Arroyo owned the fourth Mustang.

## DISCUSSION

*The Court Properly Denied Defendant's Wheeler/Batson Motion*

Defendant, an African-American, disputes the court's finding that the prosecutor's peremptory challenge of a prospective African-American juror (juror 47) was not racially motivated. He contends "the totality of the circumstances, including the prospective juror's answers and comments, do not support a non-racially motivated reason for the challenge." The People counter defendant failed to make a prima facie showing that the prosecutor's challenge had a discriminatory purpose.

Both the federal and state constitutions forbid a prosecutor from excluding prospective jurors from the jury for a purposefully racially discriminatory purpose. (*Batson v. Kentucky* (1986) 476 U.S. 79, 95-96 (*Batson*) [federal right to equal protection of the laws]; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Wheeler*) [state and federal right to trial by a representative jury], disapproved on another ground in *Johnson*

*v. California* (2005) 545 U.S. 162, 166-168.) Stated another way, the prosecution may not exercise peremptory challenges solely on the basis of presumed group bias, i.e. on the presumption "jurors are biased merely because they are members of an identifiable group based on racial . . . or similar grounds." (*Wheeler, supra,* 22 Cal.3d at p. 276.)

The following procedure applies to a *Wheeler/Batson* challenge to a peremptory strike: "'"First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'"'" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1104 (*Zambrano*).)

A defendant meets its burden of establishing a prima facie case "'by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" (*People v. Cornwell* (2005) 37 Cal.4th 50, 67 (*Cornwell*).) "In deciding whether the defendant has made the requisite [prima facie] showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." (*Batson, supra*, 476 U.S. at pp. 96-97.) A "party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic — their membership in the group — and that in all other respects they are as heterogeneous as the community as a whole." (*Wheeler, supra*, 22 Cal.3d at p. 280.) The "showing may be supplemented . . . by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."

(*Id.* at pp. 280-281.) "[T]he prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson, supra,* 476 U.S. at p. 97.)

"'We review the trial court's ruling on purposeful racial discrimination for substantial evidence. [Citation.] It is presumed that the prosecutor uses peremptory challenges in a constitutional manner.'" (*Zambrano, supra,* 41 Cal.4th at p. 1104.) "Since the trial judge's findings [on this issue] largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference" (*Batson, supra,* 476 U.S. at p. 98, fn. 21), "recogniz[ing] that such a ruling 'requires trial judges to make difficult and often close judgments.'" (*Wheeler, supra,* 22 Cal.3d at p. 281.) Nonetheless, the "exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

Here, prior to counsels' voir dire, the court posed group questions to the prospective jurors seated in the jury box. Some prospective jurors volunteered answers to these group questions. The court then questioned each prospective juror individually. From juror 47, the court elicited the following information: she was unmarried, but did have a significant relationship with someone; she was employed in "retail at Wal-mart" and her partner was unemployed; she had three children, ages 16, 19 and 21, one of whom was employed as a secretary and another with the California Conservation Corps. She replied, "No," to the court's questions whether there was anything in her background the court or counsel should know about, and whether it would be hard for her "to be fair and impartial."

Toward the start of the prosecutor's voir dire, the prosecutor expressed a concern about potentially quiet jurors. She questioned two "quiet" individuals before moving to juror 47. We recite the colloquy between the prosecutor and these three individuals to contrast the answers of the first two persons to those of juror 47:

MS. ROGAN: "I wanted to start off with the non-talkers because there are some of you that went through this whole process before the judge got to the required individual questions [who] really didn't speak much before that. So I have three that I really would like to talk to. [¶] That would be Mr. ****43 to start off with. [¶] Hi, Mr. ****43."

"[D]o you like public speaking?"

"PROSPECTIVE JUROR: No.

"MS. ROGAN: Are you one of those kind of people [who get] anxious as questions get closer to you?

"PROSPECTIVE JUROR: Yeah.

"MS. ROGAN: Okay. So if there was something that maybe was on your mind, but you thought, 'Um, kind of could of, but I really don't want to say because I really don't like speaking out in the crowd.' Is there anything that the judge talked about where you had some kind of feelings either way?

"PROSPECTIVE JUROR: No.

"MS. ROGAN: . . . Do you consider yourself a leader or follower?

"PROSPECTIVE JUROR: A follower."

MS. ROGAN: "Anybody here consider themselves a leader?" "Can I get those hands one more time?" "Okay. Mr. ****27 is a leader. You are a follower. As you're seated now, closest to [the] witness stand and you got a pretty good view, you get some evidence that Mr. ****27 perhaps didn't see or saw differently. [¶] Are you going to be able in a group setting to tell Mr. ****27, ' . . . I saw what I saw and this is what I believe the evidence was?' [¶] Are you going to be able to do that or are you going to have Mr. ****27 say, 'Um, I didn't really see it that way. This is what I saw and perhaps you misunderstood?'"

"PROSPECTIVE JUROR: I'll tell what I saw or . . . I witness because . . . I have a mind of my own.

"MS. ROGAN: Right. Are you more likely to get pushed or are you more likely to push back?

"PROSPECTIVE JUROR: Push.

"MS. ROGAN: Depending on the situation?

"PROSPECTIVE JUROR: Yeah.

"MS. ROGAN: Okay. Do you feel comfortable in a group setting speaking your mind or voicing your opinion?

"PROSPECTIVE JUROR: Small group setting.

"MS. ROGAN: A small group setting. Okay. That brings up my next question. What's small, two or 12?

"PROSPECTIVE JUROR: Twelve, like this.

"MS. ROGAN: This group is okay? These people seem friendly?

"PROSPECTIVE JUROR: Yeah, they are."

"MS. ROGAN: Okay. Mr. ****16, how are you doing?

"PROSPECTIVE JUROR: Good.

"MS. ROGAN: You were another quiet soul on the panel before the questions came out. How do you feel in a group setting?

"PROSPECTIVE JUROR: I'm okay.

"MS. ROGAN: [D]o you push?

"PROSPECTIVE JUROR: Depends on the situation.

"MS. ROGAN: Depends on the situation. You feel like you could voice your opinion in a group setting?

"PROSPECTIVE JUROR: Yes.

"MS. ROGAN: You like big groups? Little groups?

"PROSPECTIVE JUROR: I can do both.

"MS. ROGAN: Okay. [Y]ou're a manager, so you normally do lead?

"PROSPECTIVE JUROR: Yes.

"MS. ROGAN: Okay. Well, I've got my other quiet soul down here and he's a follower. You're not going to push him around, are you?

"PROSPECTIVE JUROR: No.

"MS. ROGAN: Are you going to consider his views just as well as anybody else's?

"PROSPECTIVE JUROR: Absolutely."

MS. ROGAN: "[Y]ou're the next quiet one." "Who do I have, Ms. ****47. Group setting, yes or no?" "You're okay?"

"PROSPECTIVE JUROR: Uh-huh.

"MS. ROGAN: What do you normally do?

"PROSPECTIVE JUROR: What do you mean?

"MS. ROGAN: Work?

"PROSPECTIVE JUROR: I work at Wal-Mart.

"MS. ROGAN: Okay. What makes you happy? What makes you smile?

"PROSPECTIVE JUROR: Just people.

"MS. ROGAN: People. [¶] But you're quiet, are you going to be all right in a group setting?

"PROSPECTIVE JUROR: Yeah.

"MS. ROGAN: Yes. Are you going to help your fellow quiet guy behind you out?

"PROSPECTIVE JUROR: Sure.

"MS. ROGAN: You're pretty close to the witness stand, too. What if . . . Ms. ****9 sees something, but you saw it different. Are you able in that type of setting to discuss and maybe even change your opinion?

"PROSPECTIVE JUROR: Yes.

"MS. ROGAN: Do you think so?

"PROSPECTIVE JUROR: Yes.

"MS. ROGAN: [S]ome people are like, 'No, I saw what I saw and I don't want to hear from you.' [D]oes that ever come into your play? Or do you ever do that? Do you have kids?

"PROSPECTIVE JUROR: Uh-huh.

"MS. ROGAN: How do you handle disputes between the two of them? Or do you have more than one?

"PROSPECTIVE JUROR: I have three.

"MS. ROGAN: Three. Oh, so we got a group there, that's a group setting. You don't have any problems talking in that group, right?

"PROSPECTIVE JUROR: No.

"MS. ROGAN: Okay. So how do you tell if one person in the group is saying this happened and the other person is saying the opposite happened? What are some of the things you look for to determine, 'I'm going to go with you today?'

"PROSPECTIVE JUROR: The look on their face.

"MS. ROGAN: The look on their face. What are some of the looks that they give?

"PROSPECTIVE JUROR: Sometimes they are laughing.

"MS. ROGAN: And the laughing means to you?

"PROSPECTIVE JUROR: They did it.

"MS. ROGAN: Okay. So if I laugh, I did it?

"PROSPECTIVE JUROR: Yes.

"MS. ROGAN: Okay. What are some of the other things you look for?

"PROSPECTIVE JUROR: I ask the other child.

"MS. ROGAN: Okay. So any other witnesses. [¶] Is there something maybe that if someone is quiet perhaps they . . . don't want to say what happened or they may be a little deceitful at that point?

"PROSPECTIVE JUROR: No.

"MS. ROGAN: No. [L]aughing, got to be something else besides laughing. [¶] What about turning away, shifting the eyes like? No?

"PROSPECTIVE JUROR: Sometimes.

"MS. ROGAN: Sometimes."

In this same vein, the prosecutor asked other prospective jurors if they were leaders or followers and whether they would "be able to speak up" or work well in a group.

Ultimately, the prosecutor peremptorily challenged juror 47. Among other peremptory challenges, the prosecutor also excluded a prospective African-American alternate (juror 12), who was the lone "holdout" in a prior trial. (Defendant does not object to that challenge on appeal.) Another African-American (juror 31) was selected as an alternate juror.[2]

Defense counsel objected to the jury panel under *Wheeler*, arguing "there was no race-neutral reason for excusing juror . . . 47" and juror 47 "didn't say anything that defense heard that was biased or necessitated her being excused by the prosecution." The court asked the prosecutor to state her "race-neutral grounds for excusing" the juror. Because the court clarified it had *not* found a prima facie case of discriminatory purpose, the prosecutor declined to state her grounds, but did state for the record her peremptory challenges of prospective African-American jurors constituted only one out of seven challenges for the regular jury and one out of two challenges for the alternates. The court indicated its "only concern . . . was that [juror 47] at the time of her excusal was the only African-American on the jury panel," but "note[d] that [juror 31], the first alternate, is African-American." The court stated there seemed to be reason for the challenge because juror 47 "indicated her son was in the Conservation Corps" and she "had some unanswered difficulties with the law, and such," which "would be a neutral reason."

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[2] Juror 31 eventually served on the panel when another juror was excused.

Defense counsel observed "there were maybe four African-Americans" on "the entire jury panel" and the court excluded one of them, "a law enforcement officer." By defense counsel's calculation, this left the panel with "about 6 percent African-Americans at that time." Defense counsel argued the prosecutor had excused "the only African-American on the jury panel" and the African-American alternate juror might "never have an opportunity to even have a say in this matter," so "it doesn't look like it's going to . . . be a representative jury." The prosecutor argued "the percentage of minorities . . . in the [venire] is not reason to sustain a finding of prima facie case" "because the jury is comprised of what is sent up randomly," and the question before the court was whether the challenge was "race-neutral." The court then denied the motion "for the reasons [it had] indicated."

Defendant argues that from juror "47's answers, it was clear that she was a fair, impartial and open-minded juror." He challenges the court's suggestion that a race-neutral reason existed for the challenge because juror 47 had "unanswered difficulties with the law" and "her son was in the Conservation Corps." In defendant's view, juror 47 "never stated any concern about the law and there were *no* 'unanswered questions' in that regard. She was not questioned regarding any 'law.'" Defendant further argues "there is nothing about having a child work at the [Conservation Corps] that would in any way provide a proper reason to dismiss a juror." Defendant also contends "improper dismissals cannot be insulated simply because an African-American remained on the panel as an alternate." He states "the prosecutor used her peremptory challenges to remove 100 percent of the African-American prospective non-alternate jurors."[3]

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[3] Defendant also argues a comparative analysis "does not show [juror] 47's voir dire responses were so different from the other prospective jurors that a non-race-based reason for dismissing them can somehow be inferred," but fails to support this contention with any argument and record references. (*People v. Buchanan* (2006) 143 Cal.App.4th 139, 149, fn. 1 ["Defendant does not attempt a comparative analysis on appeal; we therefore need not resolve this question"].) Moreover, such an analysis is not mandated "'in a first-stage *Wheeler-Batson* case when neither the trial court nor the

These arguments do not persuade us that defendant met his burden in the first instance to establish a prima facie case of discriminatory purpose. In making the motion, defense counsel simply contended that no race-neutral reason could exist for the prosecutor's peremptory challenge of juror 47. But the totality of the circumstances suggested otherwise. The prosecutor's questions and statements to numerous prospective jurors revealed her concern about the ability of quiet and non-expressive jurors to be effective in a group setting. Juror 47's responses were often monosyllabic and non-explanatory, despite the prosecutor's evident efforts to draw her out. In *Zambrano*, our Supreme Court noted a peremptorily challenged prospective juror, on voir dire, "displayed, and admitted, considerable nervousness, and defense counsel remarked that she seemed shy." (*Zambrano, supra,* 41 Cal.4th at p. 1107.) Although this was not the main race-neutral reason justifying the peremptory challenge in *Zambrano*, our Supreme Court deemed the prospective juror's shyness significant enough to mention.

Here other relevant circumstances included that the prosecutor did not exercise a disproportionate number of peremptories against African-Americans nor did she challenge all the African-American prospective jurors. In fact, an African-American served on the jury. In *Cornwell, supra,* 37 Cal.4th at page 69, the defendant challenged the verdict, "allud[ing] to nothing more than the circumstance that (1) one of the two African-Americans among the potential jurors had been challenged, and (2) the juror would not have been subject to excusal for cause." Our Supreme Court affirmed the judgment, stating: "The circumstance that the prosecutor challenged one out of two African-American prospective jurors does not support an inference of bias, particularly in view of the circumstance that the other African-American juror had been passed repeatedly by the prosecutor from the beginning of voir dire and ultimately served on the jury." (*Id.* at pp. 69-70; *People v. Lenix, supra,* 44 Cal.4th at p. 629 ["prosecutor's

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reviewing courts have been presented with the prosecutor's reasons or have hypothesized any possible reasons.'" (*People v. Lenix* (2008) 44 Cal.4th, 602, 622, fn. 15.)

acceptance of the panel containing a Black juror strongly suggests that race was not a motive in his challenge"].)

We accord the trial court's ruling great deference, and conclude the court properly found defendant failed to establish a prima facie case that the prosecutor's peremptory challenge of juror 47 was animated by purposeful racial discrimination.

*Substantial Evidence Showed Defendant Knew or Reasonably Should Have Known the Firearms in the Mustang Were Assault Weapons*

Defendant challenges the sufficiency of the evidence supporting his convictions for unlawful possession of assault weapons under section 12280, subdivision (b) (section 12280(b)), asserting there was insufficient proof he knew or reasonably should have known the firearms in the Mustang's trunk were assault weapons. He argues there was no evidence he handled, possessed, saw, or was ever told about the firearms. Nor, he contends, was there evidence of how long the weapons had been in the car's trunk or that anyone ever told him about the firearms.

To determine whether the evidence is sufficient, we "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We "'must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Under this standard, the [reviewing] court does not '"ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Hatch* (2000) 22 Cal.4th 260, 272.) "The standard of

appellate review is the same when the evidence of guilt is primarily circumstantial." (*People v. Holt* (1997) 15 Cal.4th 619, 668.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

Under section 12280(b), it is generally unlawful for a person to possess "any assault weapon." The statutory definition of "assault weapon" includes an AK series rifle, a Bushmaster assault rifle (§ 12276, subd. (a)(1) & (18)), and a "semiautomatic pistol that has the capacity to accept a detachable magazine and" "[a] threaded barrel, capable of accepting a . . . silencer." (§ 12276.1, subd. (a)(4)(A).)

In *In re Jorge M.* (2000) 23 Cal.4th 866 (*Jorge M.*), our Supreme Court held section 12280(b) requires "knowledge of, or negligence in regard to, the facts making possession criminal" (*Jorge M.*, at p. 887), even though "the statute contains no reference to knowledge or other language of mens rea . . . ." (*Id.* at p. 872.) "In a prosecution under section 12280(b)," the court continued, "the People bear the burden of proving the defendant *knew or reasonably should have known* the firearm possessed the characteristics bringing it within the [Assault Weapons Control Act (AWCA)]." (*Id.* at p. 887.) This "'reasonably should have known' formulation," a departure "from the usual description of criminal negligence," describes "a mental state slightly lower than ordinarily required for criminal liability." (*Id.* at pp. 887-888.) "The question of the defendant's knowledge or negligence is . . . for the trier of fact to determine, and depends heavily on the individual facts establishing possession in each case. . . . [T]he Legislature

presumably did not intend the possessor of an assault weapon to be exempt from the AWCA's strictures merely because the possessor did not trouble to acquaint himself or herself with the gun's salient characteristics. Generally speaking, a person who has had substantial and unhindered possession of a semiautomatic firearm reasonably would be expected to know whether or not it is of a make or model listed in section 12276 or has the clearly discernable features described in section 12276.1. At the same time, any duty of reasonable inquiry must be measured by the circumstances of possession; one who was in possession for only a short time, or whose possession was merely constructive, and only secondary to that of other joint possessors, may have a viable argument for reasonable doubt as to whether he or she either knew or reasonably should have known the firearm's characteristics." (*Id.* at pp. 887-888.) "[I]t would be the rare case where someone who knowingly possessed an assault weapon could show his or her justified ignorance of its characteristics. Because all persons are obligated to learn of and comply with the law, it is ordinarily reasonable to conclude that, absent 'exceptional cases in which the salient characteristics of the firearm are extraordinarily obscure, or the defendant's possession of the gun was so fleeting or attenuated as not to afford an opportunity for examination,' one who knowingly possesses a semiautomatic firearm reasonably would investigate and determine whether the weapon's characteristics made it an assault weapon." (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 832 (*Daniel G.*).)

As directed by the *Jorge M.* court, we examine "the individual facts establishing possession" in this case to determine whether substantial evidence showed defendant "had substantial and unhindered possession of a semiautomatic firearm . . . ." (*Jorge M., supra,* 23 Cal.4th at pp. 887-888.) "Possession may be actual or constructive. Actual possession means the object is in the defendant's immediate possession or control. A defendant has actual possession when he himself has the weapon. Constructive possession means the object is not in the defendant's physical possession, but the defendant knowingly exercises control or the right to control the object. [Citation.]

Possession of a weapon may be proven circumstantially, and possession for even a limited time and purpose may be sufficient." (*Daniel G, supra,*120 Cal.App.4th at p. 831.) "[I]t is possible for two or more persons to possess one weapon . . . ." (*People v. Hunt* (1963) 221 Cal.App.2d 224, 227.) "A defendant does not avoid conviction if his right to exercise dominion and control over the place where the contraband was located is shared with others." (*People v. Rushing* (1989) 209 Cal.App.3d 618, 622 [possession of cocaine].)

Here, the jury was instructed that to convict defendant of a section 12280 violation, it had to find he knowingly possessed an assault weapon and "knew or reasonably should have known that it had characteristics that made it an assault weapon." (Judicial Council of Cal. Crim. Jury Instns. (2006-2007), CALCRIM No. 2560.) Substantial evidence supports both findings. The immobilized, "broke[n] down" Mustang had been parked in defendant's back yard for at least a few months. A key to the Mustang's trunk was found atop a television in defendant's room. Viewed in a light favorable to the judgment, this evidence was sufficient to show defendant exercised dominion and control over, and had substantial and unhindered possession of, the firearms. Defendant does not argue the firearms' salient characteristics were so obscure he could not have reasonably known they were assault weapons. Indeed, one weapon bore a "Bushmaster's label," and another the "stamped" Norinco brand. These weapons had detachable box magazines, protruding pistol grips and flash suppressors. The third firearm, an AR15 weapon, had a threaded barrel which could accommodate a silencer. Defendant's unhindered possession of weapons having the unmistakable characteristics of a prohibited assault weapon constitutes substantial evidence supporting the jury's finding defendant knew or reasonably should have known the firearms were assault weapons.

*The Court Properly Denied Defendant's Request to Bifurcate the Gang Allegations*

In a pretrial motion in limine, defendant moved to bifurcate trial of the gang enhancements, arguing introduction of evidence of predicate crimes committed by Little Zion Manor Bloods members — presumably a 2003 murder and a 2005 cocaine sale — would be "extraordinarily prejudicial" to him. The People opposed the motion, arguing the weapons possession charges against defendant were "[in]extricably intertwined with the gang evidence" that shed light on defendant's motive and intent for possessing the weapons, especially the assault rifles. The court took the matter under submission, and later denied the motion. Although the court recognized defendant's concerns "regarding the potential for prejudice," it concluded bifurcation would "be too confusing" and the charges against defendant were "too difficult to separate [from] the issues of gang affiliation and the gang involvement or the gang activities . . . ."

We review the court's denial of defendant's bifurcation motion for abuse of discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*).) Defendant bears the "burden on appeal to establish an abuse of discretion and prejudice." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 225 (*Albarran*).)

In *Hernandez*, our Supreme Court stated that "less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation." (*Hernandez, supra,* 33 Cal.4th at p. 1048.) Our high court explained: "A prior conviction allegation relates to the defendant's *status* and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*Ibid.*) "[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation . . . can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of

prejudice would be dispelled, and bifurcation would not be necessary." (*Id.* at pp. 1049-1050.) Nonetheless, bifurcation of a gang enhancement is sometimes appropriate: "The predicate offenses offered to establish a 'pattern of criminal gang activity' [citation] need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Id.* at p. 1086.)

In *Albarran*, *supra*, 149 Cal.App.4th 214, in a discussion on the admissibility of gang evidence, the Court of Appeal stated, "Given its highly inflammatory impact, the California Supreme Court has condemned the introduction of such evidence if it is only *tangentially* relevant to the charged offenses." (*Id.* at p. 223.) As a "general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. [Citation.] Consequently, gang evidence may be relevant to establish the defendant's motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect." (*Ibid.*)

On appeal defendant contends the gang evidence was extremely prejudicial, was not probative on the issue of intent or motive, and was "only tangentially relevant to any issue of guilt as to the underlying charges." He does not specifically identify the gang evidence he found objectionable. Inter alia, the gang expert testified the primary activities of Little Zion Manor Bloods were narcotic sales, armed and home invasion robberies, and "other kinds of felonies"; a member committed murder in 2003; another member sold cocaine in 2005; and defendant's status within the gang would be enhanced by taking on the risk of holding a number of weapons for the gang. We find this evidence to be probative on the issues of motive and intent for defendant's possession of

three assault weapons and a pistol, showing he likely possessed the firearms to enhance his status in the gang and to assist the gang in its perpetration of drug sales and other armed offenses. The gang enhancement was "attached to the charged offense and . . . by definition, inextricably intertwined with that offense." (*Hernandez, supra,* 33 Cal.4th at p. 1048.) The evidence "was not so minimally probative on the charged offense, and so inflammatory in comparison, that it threatened to sway the jury to convict regardless of defendants' actual guilt." (*Id.* at p. 1051.) The court did not abuse its discretion by denying bifurcation.

*The Court Properly Denied Defendant's Petition for Access to Juror Information*

Defendant contends the court prejudicially abused its discretion by denying his motion for the unsealing and release of juror identifying information. The motion was based on the following declarations of defense counsel. In the deliberation room after the jury verdict, a juror informed defense counsel that the jurors did not discuss the two predicate gang offenses of murder and narcotics sales "and rendered the verdict without determining that issue." The jury foreman confirmed the jury rendered its verdict "*without deciding on whether the predicate offenses were true or not true*." A juror stated "he considered the fact that [defendant] as a 'felon' . . . was not supposed to be associating with another felon, Roman Arroyo." Another juror "informed the other jurors that there were no fingerprints taken on the firearms because that is only done in 'murder' cases."

The People opposed the motion, arguing, inter alia, (1) defendant failed to establish good cause for disclosure of juror identifying information; (2) Evidence Code section 1150 bars evidence of jurors' mental processes; and (3) incidents where defendant's family and friends confronted some jurors indicated juror safety was "an issue of concern." The prosecutor declared (1) a juror indicated "the court's taking of judicial notice of the court files [regarding the predicate gang offenses] was sufficient in

their mind to establish" the predicate acts; (2) the juror's comment about defendant associating with a felon took place not during jury deliberations, but in a "simple discussion between the jurors and counsel" about how defendant might have avoided a gang environment; and (3) as to juror safety, a juror was "confronted by one of defendant's family/friends in the parking lot" who shadow boxed in her face; another juror was followed into the restroom by three of defendant's supporters who talked "loudly about the impending verdicts," another juror stated these individuals gave him "intimidating looks," and several jurors "asked for police escorts to their vehicles as they believed there would be some type of confrontation in the court parking lot."

The court denied defendant's motion, explaining the issues presented — i.e. the jury's alleged failure to discuss predicate offenses for purposes of the gang enhancement, discussion of felon defendant's association with felon Arroyo, and speculation about the use of fingerprint evidence only in murder cases — did not strongly indicate juror misconduct had occurred. Rather, the issues related "to jurors' mental processes which are excluded under Evidence Code section 1150."[4] The issues were unlikely "to influence the verdict improperly." "There [was] no factual dispute regarding predicate offenses," and therefore no need for the jury to spend much time discussing them. In addition, "a number of the jurors [had] expressed . . . concerns regarding their safety based on confrontations that occurred in and about the courthouse during the pendency of the trial," and some jurors had required "an escort to their vehicles." The court found "no good cause shown for disclosure of . . . juror information and [that] juror safety represents a compelling interest against disclosure."

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[4] Evidence Code section 1150, subdivision (a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

At a hearing on defendant's new trial motion, defense counsel argued, inter alia, the "misconduct of the spectators . . . had [a] prejudicial effect on [defendant's] trial." Defense counsel confirmed that a juror complained a spectator "mad dogg[ed] or star[ed] at him in a hostile manner," another juror was followed into the restroom, and one juror "was fearful that he would be shot because of his involvement in this case." The court stated, "Just so the record's clear on this, in my observation of the spectators during the trial, all of [them] appeared to be individuals that were here to support [defendant]."

Code of Civil Procedure section 206, subdivision (g) provides: "Pursuant to [Code of Civil Procedure section] 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers. The court shall consider all requests for personal juror identifying information pursuant to [Code of Civil Procedure section] 237." Code of Civil Procedure section 237, subdivision (b) provides: "Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a

prima facie showing of good cause or the presence of a compelling interest against disclosure."

"Denial of a petition filed pursuant to Code of Civil Procedure section 237 is reviewed under the deferential abuse of discretion standard." (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.)

Here, the court did not abuse its discretion by denying defendant's motion for juror identifying information. Abundant evidence established "the presence of a compelling interest against disclosure" based on the need to "protect[] jurors from threats or danger of physical harm." (Code Civ. Proc., § 237, subd. (b).) Both parties and the court agreed the actions of defendant's supporters had made certain jurors afraid for their safety. The court found defendant failed to make a satisfactory showing of possible juror misconduct; we find no abuse of discretion in this finding.

*The Section 667.5 Enhancement Must be Reversed Because the People Failed to Prove Defendant Served a Prior Prison Term*

Defendant contends his one-year sentencing enhancement for a prior prison term must be stricken. He argues that, "[s]olely for purposes of the felon in possession counts, [he] admitted having suffered a prior conviction" and waived his right to a jury trial on the prior. According to defendant, he never admitted serving a prison term, nor does the reporter's transcript reflect such an admission.

Section 667.5, subdivision (b) generally mandates a consecutive "one-year term for each prior separate prison term served for any felony; [unless the prison term was] served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction." "The additional penalties provided for prior prison terms shall not be imposed unless they are charged and admitted or found true in the action for the new offense." (§ 667.5, subd. (d).)

The first amended information alleged as to all counts, pursuant to section 667.5, subdivision (b), that defendant had suffered a prior conviction for possession of a firearm by a felon in June 2004, served a prison term for that offense, and did not remain free from prison custody or another felony conviction for a subsequent period of five years.

In a written pretrial motion in limine, defendant moved the court to accept a stipulation on his prior conviction and thereafter exclude any mention of it to the jury. Relying on *People v. Hall* (1998) 67 Cal.App.4th 128 (*Hall*), he argued he was "entitled to stipulate to the prior and thereby preclude the jury from learning of the prior."[5] Defendant's written motion in limine did not mention any prior prison term served by him.

At the hearing on defendant's in limine motion, the court stated its "understanding is that the defense is willing to stipulate to the 211 [robbery] and 12021 [possession of firearm by felon] conviction[s] for purposes of both the priors and also for the purposes of one of the elements of the charges in this case; is that correct?" Defense counsel said, "Yes, Your Honor." The court inquired, "And the defendant waived his right to a jury trial in determining the priors; is that correct?" Defense counsel replied: "Yes, Your Honor." "We're going to stipulate to that." The court then asked defendant directly, "Is that true, Mr. Pezant, you waive your right to a jury trial in that regard?" to which defendant replied, "Yes." In response to defense counsel's query, the court

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[5] Contrary to defendant's assertion, *Hall* recognized that a defendant "*cannot* preclude [the] jury from learning of [his or her] ex-felon status where [an] ex-felon in possession of a firearm offense [is] charged." (*Hall*, *supra*, 67 Cal.App.4th at p. 135, italics added.) Rather, *Hall* held evidence of a prior conviction can be kept from the jury when the charged offense is carrying a concealed weapon under section 12025, because a prior conviction for purposes of section 12025, subdivision (b)(1) "is simply a sentencing factor which serves to elevate the offense from misdemeanor to felony; . . . not an element of the offense of carrying a concealed firearm . . . ." (*Hall*, at p. 135.) Accordingly, the jury in the case at hand was eventually informed defendant had suffered a prior felony conviction.

clarified defendant only needed to admit one prior conviction, not both. The court instructed both counsel to "work up the specific language of the stipulation read to the jury," to the effect "that he has suffered a prior felony conviction that would prohibit him from owning or operating ammunition or weapon[s]."

At the close of the People's case, the court read the jury the following stipulation: "In this matter the People are required to prove that the defendant had previously been convicted of [a] felony. The parties in this matter . . . have agreed to stipulate to the following for purposes of this trial: [¶] Jason Pezant had previously been convicted of a felony. Said felony qualifies to meet the requirements in this case for purposes of conviction."

A November 7, 2007 minute order reflects that on the eighth day of trial, the jury found defendant guilty on all counts, after which "[d]efendant admit[ted] prior 1."

At the January 4, 2008 sentencing hearing, the court sentenced defendant to one year of imprisonment for a prior prison term enhancement under section 667.5, subdivision (b). Defense counsel objected, stating, "667.5 of the Penal Code . . . was not found true." The court replied defendant had admitted the prior. The court explained: "At the conclusion of the trial before the jury came in with a verdict[,] I[] asked whether or not he wanted a bifurcation . . . and he indicated he did not. And he . . . admitted that prior prison [term]. That's why we didn't have a bifurcation of that issue." The court continued, "It's been found true."

In *People v. Tenner* (1993) 6 Cal.4th 559, our Supreme Court summarized the requirements for a prior prison term enhancement: "Imposition of a sentence enhancement under Penal Code section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction."

(*Id.* at p. 563.) "Due process requires the prosecution to shoulder the burden of proving each element of a sentence enhancement beyond a reasonable doubt." (*Id.* at p. 566.) To prove the element that a defendant "completed his term of imprisonment," an "abstract of judgment and commitment form can suffice as proof," although the "better practice" is to introduce into evidence a "prison packet" under section 969b (certified records or copies of records of a prison or jail). (*Id.* at p. 567.) Here, the record does not reflect the prosecutor ever introduced any evidence of defendant's prior prison term nor do the People argue she did.

The People reason that defendant "stipulated to the prior convictions," and the "jury found him guilty of the current felony offense," i.e. a new felony within five years; therefore, "[t]he only remaining evidentiary stipulations were that [defendant] served and completed a prison term for his prior felon in possession offense." The People contend defendant admitted his prior prison term, but the only record reference they provide is the November 7, 2007 minute order stating defendant admitted "prior 1."

Our review of the record does not reveal defendant ever admitted serving a prior prison term. His pretrial in limine motion and the ensuing discussion between the court and defense counsel referred only to defendant's prior conviction. (The court specified its "understanding" was that the defense was "willing to stipulate to the 211 and 12021 *conviction*[*s*] for purposes of both the priors and also for the purposes of one of the elements of the charges in this case." (Italics added.) The resulting stipulation referred to defendant's prior conviction. At the sentencing hearing, the court stated defendant admitted his prior prison term at "the conclusion of the trial before the jury came in with a verdict . . . ." The date on which the trial concluded and the jury returned a verdict was November 7, 2007. The reporter's transcript for November 7, 2007 does *not* show defendant made an admission, nor does it suggest any part of the proceedings that day was not reported. According to the reporter's transcript, the only time defendant spoke was to waive his right to a speedy sentencing. In contrast, the November 7, 2007 minute

order in the clerk's transcript states "[d]efendant admit[ted] prior 1" immediately after the jury announced its verdict and before the jurors were polled, but does not specify whether the admission encompassed a prior prison term. In this respect, the clerk's transcript and the reporter's transcript conflict. "'As a general rule, a record that is in conflict will be harmonized if possible. [Citation.] If it cannot be harmonized, whether one portion of the record should prevail as against contrary statements in another portion of the record will depend on the circumstances of each particular case. [Citation.].'" (*People v. Marks* (2007) 152 Cal.App.4th 1325, 1328.) On this issue, the reporter's transcript and the clerk's transcript cannot be harmonized. In any case, the clerk's transcript does not specify defendant admitted serving a prior prison term, but states only he admitted a "prior." Thus, no substantial evidence supports the court's finding that defendant served a prior prison term. The enhancement must be stricken.

*Defendant's Sixth Amendment Right to a Jury Trial Was Not Violated*

Relying on *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856] (*Cunningham*), defendant contends the court violated his constitutional right to a jury trial under the Sixth and Fourteenth Amendments by sentencing him to the upper term for possession of a firearm by a felon, based on a factual determination made by the court. Here, the court selected the upper term after finding "defendant's prior performance on parole was unsatisfactory." (Defendant was on parole at the time of the current offenses. At the sentencing hearing, the court noted the "prior record does indicate a pattern of regular and serious criminal misconduct.") Under California Rules of Court, rule 4.421(b)(5), for purposes of determinate sentencing, a court may consider as an aggravating circumstance that a defendant's "prior performance on probation or parole was unsatisfactory."

In *Cunningham*, *supra*, 549 U.S. 270 {127 S.Ct. 856], the United States Supreme Court held California's former determinate sentencing law (DSL) violated the

Sixth Amendment because it "authorize[d] the judge, not the jury, to find the facts permitting an upper term sentence" (*id*. at p. 871) and to find those facts by a preponderance of the evidence instead of beyond a reasonable doubt. (*Id*. at p. 868.) Thus, "the DSL violate[d the] bright-line rule [articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490]: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Id.* at p. 868.)

In *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), our Supreme Court held "that imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Id*. at p. 816.) *Black II* noted the "United States Supreme Court consistently has stated that the right to a jury trial does not apply to the fact of a prior conviction." (*Id*. at p. 818.) *Black II* held "the 'prior conviction' exception" "include[s] not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Id*. at p. 819.)

In *People v. Towne* (2008) 44 Cal.4th 63 (*Towne*), our Supreme Court stated: "When a defendant's prior unsatisfactory performance on probation or parole is established by his or her record of prior convictions, it seems beyond debate that the aggravating circumstance is included within the [prior conviction] exception and that the right to a jury trial does not apply." (*Id.* at p. 82.) Defendant acknowledges *Towne* defeats his contention his Sixth Amendment right was violated, but argues the case was wrongly decided.

We are bound by the decision of the California Supreme Court in *Towne*, *supra*, 44 Cal.4th 63. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450,

455.) The court's imposition of the upper term for possession of firearm by a felon did not violate defendant's constitutional right to a jury trial.

## DISPOSITION

The judgment is modified by striking the prior prison term enhancement under section 667.5, subdivision (b) and the corresponding one-year prison term sentence. The court is directed to prepare an amended abstract of judgment reflecting the modified sentence and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

ARONSON, J.